

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0053, Van E. Hertel, Sr., Trustee of The Raed Hertel Family Trust, U/D/O 1/191 v. Universal Grace Church, the court on April 17, 2006, issued the following order:

The petitioner, Van E. Hertel, Sr., Trustee of the Raed Hertel Family Trust, U/D/O 1/191, appeals the order of the trial court ruling on his petition to establish a right of way across the property of the respondent, Universal Grace Church. He argues that the trial court erred in limiting his use to occasional recreational use and logging and in denying him an easement on the grounds of necessity. We affirm.

“[T]he uses to which easements may be put are questions of fact to be arrived at by considering all of the surrounding circumstances, including location, the uses of both parties’ properties and the advantage of one owner’s use and the disadvantage to the other owner caused by that use.” Nadeau v. Town of Durham, 129 N.H. 663, 667 (1987) (quotations omitted). Credibility and the weight to be given to testimony are questions of fact for the trial court; if the findings could reasonably be made on all the evidence they must stand. Sargent Lake Ass’n v. Dane, 118 N.H. 720, 721 (1978). We will not substitute our judgment for that of the trier of fact if it is supported by the evidence, especially when he has been supported in reaching his conclusions by a view. Heston v. Ousler, 119 N.H. 58, 60 (1979).

In this case, the trial court found that the petitioner had acquired an easement by prescription based on both adverse possession and equitable estoppel. The petitioner contends that the trial court’s limitation on the use of the easement imposed an unreasonable and ambiguous restriction, severely limiting the petitioner’s use and transferability of the parcel. Although he argues that the trial court erred by focusing on the use of the dominant estate rather than the use of the easement, we disagree. In its order, the trial court found that the driveway and adjoining woods road that were the subject of the dispute “have been used for both recreational uses and logging activities.” The record contains evidence to support these findings. Based upon these findings, the trial court found that the reasonable use of the easement was for travel related to occasional recreational use and logging. See Sandford v. Town of Wolfeboro, 152 N.H. 1, 4 (2005) (scope of prescriptive easement defined by character and nature of use that created it).

The petitioner also argues that, in assessing the scope of the easement, the trial court should have applied a test of foreseeability and that the owner of the

servient estate “could easily have foreseen that once the property was logged, a subsequent owner might choose to develop the parcel, even for a few single family dwellings.” Based upon the record before us and the reasoning we have previously articulated herein, we conclude that the trial court did not err in failing to find that the petitioner had acquired a general easement. See id. (“Because no use can ever be exactly duplicated, some variation between the use by which a prescriptive easement was created and the uses made under it after its creation is inevitable.”). While we have approved some evolution in the scope of prescriptive easements, the doctrine of foreseeability does not require that a limited easement be converted to general use when the previous use cannot be exactly duplicated.

The petitioner also argues that once the trial court found that a right of way had been created by equitable estoppel, it erred in applying a reasonable use standard. He does not argue that a reasonable use standard does not apply in cases based on equitable estoppel, but rather that in this case, the testimony did not support a finding that the right of way was in any way limited. A review of the record, however, provides evidence to support the trial court’s finding that the parties’ discussion of the use of the road concerned logging operations. Accordingly, we find no error.

Nor do we find the scope of the easement ambiguous. Because no use can ever be exactly duplicated, the trial court was correct in establishing the parameters of permissible use. These parameters closely approximated the previous use, that is, infrequent use related to occasional recreation and logging.

The petitioner’s final argument is that the trial court erred in failing to grant an easement by necessity. Easements by necessity arise from the implied intent of the parties; necessity alone is insufficient to create such an easement. Bradley v. Patterson, 121 N.H. 802, 803 (1981). The trial court found that the petitioner failed to establish that access to its property was only possible over the respondent’s land and that the earlier owners of the land intended to create an easement at the time of the land’s subdivision. Because these are factual determinations and the record before us on appeal supports findings that the evidence was inconclusive at trial, we find no error.

Affirmed.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**